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Recognizing Error and Fraud in the Contract of Marriage in Louisiana

I. INTRODUCTION

As evidenced by the heated debates over the recognition of same-sex unions,¹ as well as by the slew of reality television shows devoted to the topic, marriage remains a fundamental establishment in society. While it has been observed that “marriage is a divine institution, which, when validly contracted, is indissoluble except by death,”² allowance must be made for the termination of a marriage not “validly contracted.” Though divorce has become as commonplace as marriage,³ less popular remedies, such as annulment, should be more often considered and utilized. As some scholars have noted, “there can be little doubt but that annulment, *properly understood and properly applied*, is a legitimate and moral method of ending a marital relationship.”⁴ In Louisiana, annulments should be recognized by the law as an available option for spouses wishing to terminate their marriage under specific instances of error and fraud.

Though divorce was once more legally advantageous than annulment,⁵ in 1994, the legislature recognized the need to statutorily provide the same relief to petitioners in either proceeding.⁶ As in a divorce, both interim⁷ and final incidental

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1. See, e.g., Evan Thomas, *The War Over Gay Marriage*, Newsweek, July 7, 2003, at 38.

2. James E. Harpster, *Grounds for Annulment*, 35 Marq. L. Rev. 81, 93 (1951–1952).

3. Michael P. Nichols, *The Essentials of Family Therapy* 89 (Pearson Educ., Inc. 2d ed. 2003) (The author states: “One variation of the life cycle that can no longer be considered a deviation is divorce. With the divorce rate at 50 percent and the rate of re-divorce at 61 percent, divorce now strikes the majority of American families.” (citing R. Kreider & J. Fields, Number, timing, and duration of marriages and divorces, Current Population Reports, U.S. Census Bureau (2002))).

4. Harpster, *supra* note 2, at 82.

5. See, e.g., Note, *The Aftereffects of Annulment: Alimony, Property Division, Provision for Children*, 1968 Wash. U. L.Q. 148, 153, n.27. Including Louisiana among his examples, the author notes, “In the absence of an express statutory provision, most courts have not allowed permanent alimony following an annulment.” *Id.*

6. La. Civ. Code arts. 151–52.

relief⁸—such as final periodic spousal support,⁹ child custody,¹⁰ and child support¹¹—may be available to the party in an annulment.¹² As such, the prior legal advantages to seeking a divorce, as opposed to an annulment, have been eliminated.

In addition, an annulment may provide greater emotional benefits than a divorce. Espousing the emotional advantages of an annulment for the parties involved, one commentator noted:

The social stigma attached to divorce may constitute a significant burden to some. Those who dissolve a short but unpleasant relationship may feel significantly better if the legal procedure used reinforces their denial that any significant bond ever existed with the ex-partner. Moreover,

7. La. Civ. Code art. 151 ("Proceeding for declaration of nullity of a marriage; interim incidental relief") provides: "In a proceeding for declaration of nullity of a marriage, a court may award a party the incidental relief afforded in a proceeding for divorce." See also La. Civ. Code art. 105 (noting that incidental relief entails "a determination of custody, visitation, or support of a minor child; support for a spouse; injunctive relief; use and occupancy of the family home or use of community movables or immovables; or use of personal property.").

8. La. Civ. Code art. 152 ("Proceeding for declaration of nullity of a marriage; final incidental relief") provides:

After the declaration of nullity of a marriage, a party entitled to the civil effects of marriage may seek the same relief as may a divorced spouse. Incidental relief granted pending declaration of nullity to a party not entitled to the civil effects of a marriage shall terminate upon the declaration of nullity. Nevertheless, a party not entitled to the civil effects of marriage may be awarded custody, child support, or visitation. The award shall not terminate as a result of the declaration of nullity.

9. La. Civ. Code art. 111.

10. La. Civ. Code art. 152 (quoted *supra* note 8); La. Civ. Code arts. 131–37.

11. La. Civ. Code art. 152 (quoted *supra* note 8); La. Civ. Code art. 141.

12. Distinction must be made between absolutely null and relatively null marriages to determine the relief available. See La. Civ. Code art. 94 ("Absolutely null marriage"), La. Civ. Code art. 95 ("Relatively null marriage; confirmation"), La. Civ. Code art. 96 ("Civil effects of absolutely null marriage; putative marriage"), and La. Civ. Code art. 97 ("Civil effects of relatively null marriage"). See also La. Civ. Code art. 152 cmt. b (noting that while incidental relief "may be granted irrespective of the nature of the alleged nullity, and of whether he was in good or bad faith in contracting the marriage," post-judgment relief "is available only to parties to relatively null marriages and to parties to absolutely null marriages who are deemed entitled to civil effects as putative spouses under Civil Code Article 96.").

although a civil annulment may not satisfy Catholic canon law, it may be preferable to some Catholics, because it is theoretically more consistent with the religious remedy than is divorce.¹³

After providing a brief overview of the requisite marital consent in Part II of this paper, consideration is given to the connection between annulments and three timely issues in Louisiana: same-sex marriage, covenant marriage, and divorce. Part III addresses the historical background of the marital vices of consent in Louisiana. Following recognition of the special nature of the marriage contract, the present elimination of error and fraud from this contract is established. Particularly, the seminal cases that established the narrow interpretation of the vices and led to their removal are discussed. By analyzing the approaches used in the context of general contract law, as well as the approaches of other states to the vices of marital consent, Part IV proposes the reintroduction of fraud and error in Louisiana as sufficient to nullify a marriage contract. Finally, Part V surmises the positive effects of recognition of the three vices of consent in the marriage contract in Louisiana. In sum, the legislature must re-institute the vices of fraud and error as sufficient to nullify a marriage so as to provide the citizens of Louisiana with an alternative method for dissolving a marriage—annulment.

II. MARRIAGE AND ANNULMENT IN LOUISIANA

To fully understand the shortcomings of Louisiana's approach to marriage annulments, consideration must be made of the discrepancies inherent in the state's present article on marital vices of consent. The approaches used by other jurisdictions, as well as Louisiana's stance on several contemporary social issues, are at variance with the state's limited recognition of the marital vices of consent.

A. *The Importance of "Free Consent" in a Marriage Contract*

13. Note, *supra* note 5, at 163.

In establishing a "validly contracted" marriage, free consent is an essential requirement. Presently, Louisiana Civil Code article 87 requires that the contract of marriage include the "free consent of the parties to take each other as husband and wife, expressed at the ceremony."¹⁴ By including this as one of only three mandatory elements in all marriages, the state indicates the great importance that it places upon consent.¹⁵

Nevertheless, this crucial "free consent" is susceptible of vitiation. Within the context of general contract laws, three classic, consensual vices—error, fraud, and duress—are explicitly recognized.¹⁶ In the Louisiana Civil Code of 1870, each of these vices was also expressly recognized as applicable to the contract of marriage.¹⁷ Presently, however, only duress is enumerated in the Civil Code as a vice of consent sufficient to vitiate a marriage contract.¹⁸ Notably, the Louisiana Legislature's elimination of error and fraud did not operate to align our state's policy with that of our sister states' policies; instead, nearly every other state recognizes at least two of the three vices explicitly and, in some instances, a variance of the third.¹⁹ Neither did this action conform our law to that of other civil law jurisdictions, as nearly every civilian jurisdiction expressly enumerates at least two of the three vices in its

14. La. Civ. Code art. 87.

15. La. Civ. Code art. 87 provides, in full:

The requirements for the contract of marriage are:

The absence of legal impediment.

A marriage ceremony.

The free consent of the parties to take each other as husband and wife, expressed at the ceremony.

16. La. Civ. Code art. 1948.

17. La. Civ. Code art. 91 (1870) provided:

No marriage is valid to which the parties have not freely consented.

Consent is not free:

1. When given to a ravisher, unless it has been given by the party ravished, after she has been restored to the enjoyment of liberty;

2. When it is extorted by violence;

3. When there is a mistake respecting the person, whom one of the parties intended to marry.

18. La. Civ. Code art. 93 ("Vices of consent") provides: "Consent is not free when given under duress or when given by a person incapable of discernment."

19. See *infra* Appendix: State Chart of Marital Vices; see also Franklin G. Fessenden, *Nullity of Marriage*, 13 Harv. L. Rev. 110, 113 (1899-1900) (indicating that the causes for voidable marriages "well recognized by law" then included "want of consent, including mistake as to persons, duress, and fraud").

codal articles.²⁰ Is Louisiana on the cutting-edge, or is it frustrating the availability of annulments for its citizens? This author believes it is the latter.

20. See, e.g., Código Civil [Cód. Civ.] art. 175 (Arg.) (J.R. Trahan trans.):

Violence, fraud, and error regarding the person of the other contracting party vitiate consent. So also does error regarding the personal qualities of the other contracting party, if it is proved that he who made the error would not have consented to the marriage if he had known the state of things and had reasonably appreciated the union that he was contracting. The judge will evaluate the essentiality of the error considering the personal conditions and circumstances of him who alleges it.

Codice Civile [C.C.] art. 122 (Italy), *quoted in* The Italian Civil Code and Complementary Legislation 22–23 (Mario Beltramo, Giovanni E. Longo, & John H. Merryman trans.) (1969):

A marriage can be attacked by that spouse whose consent was extorted by duress or was caused by a fear of exceptional gravity deriving from causes external to the future spouse. A marriage can also be attacked by that spouse whose consent was given as a result of a mistake on the identity of the person or of an essential mistake concerning personal qualities of the other spouse. A mistake concerning personal qualities is essential when, having regard to the condition of the other spouse, it is determined that the latter would not have given his consent if he had known them exactly and provided the mistake relates to:

1) the existence of a physical or psychic illness or of a sexual anomaly or deviation such as can prevent the development of marital life;

2) the existence of a verdict of conviction for a non culpable crime with a sentence to imprisonment for not less than five years except in case rehabilitation has been granted before the celebration of marriage. The action for annulment cannot be brought until the verdict has become final;

3) a declaration of habitual or professional delinquency;

4) the fact that the other spouse was convicted for crimes concerning prostitution to a sentence of not less than two years. The action for annulment cannot be brought until the conviction has become irrevocable;

5) a state of pregnancy caused by a person other than the subject who was affected by the mistake provided that a disclaimer of paternity pursuant to Article 223 occurred, if the pregnancy was brought to conclusion.

The action cannot be brought if there was cohabitation for one year after cessation of the duress or of the causes that resulted in the fear or after the discovery of the mistake.

Código Civil [Cód. Civ.] art. 73 (Spain), *quoted in* Civil Code of Spain 33 (Julio Romanach trans. (1994)).

The following are null regardless of the manner in which they are contracted:

...

B. The Effects of Annulment on Louisiana's Marriage Policy

Louisiana's present exclusion of fraud and error as vices sufficient to annul a marriage contract is at odds with several state policies.

1. Same-Sex Marriage: Eliminating the Possibility of Valid Transsexual Unions

First, as the recently successful amendment to the state constitution reveals,²¹ Louisiana is determined to ensure that same-sex unions will not be recognized as matrimonial relations. However, in our technologically and medically advanced society, sex change operations are possible and more prevalent than the average citizen may realize.²² Unions involving transsexuals may not seem like "traditional" same-sex marriages, but several courts have classified them as such, thereby foreclosing their legal recognition.²³ However, because the issue remains open in

4. A marriage contracted in error concerning the identity of the other contracting party, or in error as to those personal qualities that, because of their importance, were determining factors in the giving of consent.

5. A marriage contracted under coercion or great fear.

21. See, e.g., Will Sentell, *Voters OK Constitutional Ban on Same-sex Marriage*, *The Advocate* (Baton Rouge), Sept. 19, 2004, at 1A; Ed Anderson, *Same-sex Marriage Ban is Nullified*, *The Times Picayune*, Oct. 6, 2004 at 1, available at <http://www.nola.com/search/index.ssf?/base/library-57/109704585949110.xml?nola>; The Associated Press, *La. Reinstates Marriage Ban*, *CBS News.com*, Jan. 19, 2005, available at <http://www.cbsnews.com/stories/2004/11/02/national/main653118.shtml>.

22. Lynn Conway, *Vaginoplasty: Male to Female Sex Reassignment Surgery*, Oct. 14, 2005, <http://ai.eecs.umich.edu/people/conway/TS/SRS.html>; Lynn Conway, *How Frequently Does Transsexualism Occur?*, Dec. 17, 2002, <http://ai.eecs.umich.edu/people/conway/TS/TSprevalence.html> (in the 1960s, there were approximately 1,000 operations performed; in the 1970s, 6,000 to 7,000 were performed; in the 1980s, 9,000 to 12,000; and, in the 1990s, 14,000 to 20,000 were performed); Jerold Taitz, *Judicial Determination of the Sexual Identity of Post-Operative Transsexuals: A New Form of Sex Discrimination*, 13 *Am. J.L. & Med.* 53, 56 (1987) ("[T]here were an estimated 6,000 post-operative transsexuals in the United States by 1983.") (noting that, as of 1983, "the number of post-operative transsexuals doubled in 7 years.").

23. See, e.g., *In re Estate of Gardiner*, 42 P.3d 120, 135, 137 (Kan. 2002) ("A male-to-female post-operative transsexual does not fit the definition of a female J'Noel [the plaintiff] remains a transsexual, and a male for purposes of marriage."); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999),

Louisiana,²⁴ same-sex marriage proponents may use the possible validity of transsexual unions as grounds for their argument for marital rights.

Moreover, since “[c]ourt battles over the issue of birth certificate sex changing normally arise in the context of marriage,”²⁵ it is important to note that Louisiana permits the issuance of new birth certificates to persons following an anatomical change of sex by surgery.²⁶ If such a person petitions a court and provides sufficient proof of his change of sex, his birth record, as well as his name, may be altered to reflect the change.²⁷ Because a certified copy of each party’s birth certificate must be provided to obtain a marriage license,²⁸ the newly-issued birth certificate would be used by the post-operative transsexual.²⁹ Thus, it seems possible that a party

cert. denied, 531 U.S. 872, 121 S.Ct. 174 (2000); *In re Declaratory Relief for Ladrach*, 32 Ohio Misc. 2d 6, 10 (Ohio Misc. 1987) (explaining that no authority existed in Ohio for the issuance of a marriage license to a “post-operative male to female transsexual person and a male person.”). However, other courts have concluded that such marriages involving a transsexual may be valid. For instance, the decision of the New Jersey Supreme Court in *M.T. v. J.T.* announced that, though parties are born the same sex, a valid marriage may exist between a post-operative male-to-female transsexual and a male. 355 A.2d 204 (N.J. 1976). See also Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA Women’s L.J. 219, 256 (1998) (“[T]he transsexual marriage cases show courts struggling to categorize the defendants as male or female in order to decide if their marriages were valid.”) (referring to transsexual marriage cases such as *Vecchione v. Vecchione*, No. 96D003769 (Orange County filed April 23, 1996)).

24. See Katherine Shaw Spaht, *Revision of the Law of Marriage: One Baby Step Forward*, 48 La. L. Rev. 1131, 1137, n.46 (1988) (In addressing the revisions to the articles on marriage annulments, the author explicitly notes that, while same sex marriages are absolutely null, “[l]eft unanswered is the question of the transsexual, who is genetically a member of one sex but by virtue of surgery and hormone treatments is anatomically a member of the other sex.”). See also Helen G. Berrigan, *Transsexual Marriage: A Trans-Atlantic Judicial Dialogue*, 12 Law & Sexuality 87, 116 (2003) (“Only five states have directly dealt with the question of whether transsexuals can marry. The issue is open in all others. Louisiana is one such state.”).

25. John M. Ohle, *Constructing the Trannie: Transgender People and the Law Footnote*, 8 J. Gender Race & Just. 237, 255 (2004).

26. See La. R.S. 40:62 (2003).

27. *Id.*

28. La. R.S. 9:225–28 (2003).

29. La. R.S. 40:62 D(1) & (2) provide, in part:

[T]he original birth certificate and the copy of the petition and judgment received by the registrar shall be sealed in a package and filed in the archives of the vital records registry.

may enter into what he considers to be a valid marriage, though he is unaware of his spouse's prior gender and subsequent change of birth records and name.³⁰ But, because Louisiana does not recognize error or fraud as legitimate grounds for annulment of a marriage, the mistaken or defrauded party in such a scenario could not have the marriage annulled for mistake regarding the physical identity of the person.³¹ Instead, he would have to resort to divorce laws to end the marriage, which would preserve the validity of their union.

2. *Covenant Marriage: Establishing a Solid Foundation*

Second, Louisiana has exemplified its belief that marriage is a sacred, life-long commitment through its adoption of covenant marriage laws.³² Enacted in 1997, the Covenant Marriage Act permits couples to enter into a covenant marriage only after engaging in pre-marital counseling, signing a declaration of intent, and agreeing to attend pre-divorce counseling, if necessary.³³ Thus, higher standards are in place for both entry into and dissolution of a

This sealed package shall be opened only upon demand of the individual to whom the new certificate was issued, and then only by the court which rendered the judgment ordering the issuance of the new certificate.

30. See Melissa Aubin, *Defying Classification: Intestacy Issues for Transsexual Surviving Spouses*, 82 Or. L. Rev. 1155, 1175 (2003) ("[I]n cases involving transsexuals, courts appear to have a heightened suspicion that the transsexual will not have fully disclosed his or her sexual status."); Coombs, *supra* note 23, at 256 ("The courts [which have dealt with transsexual marriage cases] agree that the nontranssexual partner is entitled to know what he or she is getting into, and that fraud or concealment of transsexual status are grounds to declare the marriage void.").

31. See Coombs, *supra* note 23, at 261 ("Deception as to one's sexual identity, if proven, is surely an appropriate grounds for an annulment."). See also Spaht, *supra* note 24, at n.46. Spaht argues:

The problem of the transsexual who marries another unsuspecting party might have been considered solved by using the language in La. Civ. Code art. 91 (1870): "mistake respecting the person." That phrase has been eliminated However, the court is not precluded from resorting to general principles of obligations law, such as error, . . . to dispose of unanswered problems.

But see, *infra* Part III.A.2. (arguing that the list of marital vices of consent in the current codal article is exclusive).

32. Katherine Shaw Spaht, *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*, 59 La. L. Rev. 63, 74 (1998).

33. La. R.S. 9:272-75 (2003).

covenant marriage. As proponents have noted, "Covenant marriage legislation, hopefully, is only the beginning of the resurgence of interest in and protection of the institution of marriage—the foundation upon which the 'family' is built."³⁴ However, a solid foundation for a marriage is not likely if it is based upon error or fraud.

The contention that marriage will be strengthened by permitting error and fraud as grounds for annulment initially may seem counter-intuitive. Yet, failure to condone marriages procured through fraud and error will actually ensure that the serious, sacred nature of marriage continues. As the covenant marriage legislation illustrates, our legislature approves the policy of protecting marriage. But, the legislature simultaneously disregards this policy by implicitly stating that error and fraud are acceptable components of a marriage contract. To exemplify its adherence to the tenets of marriage announced in article 86³⁵ ("marriage is between a man and a woman") and to reiterate its commitment to the marital relationship, the Louisiana Legislature should re-institute error and fraud as grounds for annulling a marriage.

3. Divorce Laws: Distinguishing Between Annulment and Divorce

Third, Louisiana employs an extremely liberal approach to resolving contested divorce cases;³⁶ however, the ease with which a divorce can now be obtained does not remedy the state's narrow allowance of annulments.³⁷ In distinguishing between situations

34. Spaht, *supra* note 32, at 83 (citation omitted).

35. La. Civ. Code art. 86 ("Marriage; definition") provides: "Marriage is a legal relationship between a man and a woman that is created by civil contract. The relationship and the contract are subject to special rules prescribed by law."

36. Couples must live "separate and apart" for six months before being granted a "no-fault" divorce; only Louisiana and Montana recognize such a short time period. See John R. Trahan, *Louisiana Civil Law: Persons & the Family, Unilateral Divorce for Merely "Living Separate and Apart," A State-by-State Comparison* (2003) (on file with author); see also Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Increased Mobility Creates Conflicts*, 36 Fam. L.Q. 515, 562 (2003) ("Chart 4: Grounds for Divorce and Residency Requirements"). See also La. Civ. Code arts. 102–03.

37. One might argue that Louisiana's limited recognition of annulments strengthens the marital bonds by forcing couples to endure, at a minimum, a six month period of separation before the attainment of a divorce. But, this brief

calling for annulment and those best resolved by divorce, the timing of the actionable vice is key. In a divorce proceeding, the determinative event usually occurs after the marriage ceremony; thus, the spouses have both freely consented to the union and only later have decided to terminate the relationship.³⁸ However, in an annulment action, the vitiating circumstance is present at the time of the marriage ceremony.³⁹ Indeed, because of the vitiating circumstance, the innocent spouse is unable to freely abstain from entry into the marital relationship. Had the vice been known to him (in the case of error or fraud) or eliminated (in the case of duress), he would never have consented to the marriage in the first place.⁴⁰ As one commentator emphasized, "When defects existing at the time of the marriage ceremony cause the union to be invalid, annulment is the proper remedy."⁴¹ Because divorce merely dissolves a valid marriage, it is an insufficient remedy for dissolution of a marriage invalid from its inception.

C. Louisiana's Present Approach to the Marital Vices of Consent

Though the 1870 Civil Code recognized error, fraud, and duress as sufficient vices of consent of a marriage contract, the current

time limitation has not provided such a deterrent. Instead, Massachusetts, which permits annulments for error, fraud, or duress, has the lowest divorce rate in the United States. See William V. D'Antonio, *Walking the Walk on Family Values*, The Boston Globe, Oct. 31, 2004, at E11, available at http://www.boston.com/news/globe/editorial_opinion/oped/articles/2004/10/31/walking_the_walk_on_family_values/.

38. May Bamforth Hubert, Comment, *The Annulment of Marriages in Louisiana*, 24 Tul. L. Rev. 217, 217 (1949–1950) ("[A] divorce can obviously be granted for causes which occur only after the marriage . . ."); see also Caleb Foote et al., *Cases and Materials on Family Law* 92 (Little, Brown and Company, 3d ed. 1985) (emphasizing that "divorce assumes a valid marriage and is granted for conditions that have developed since marriage.").

39. Hubert, *supra* note 38, at 217 (noting that "annulment can be decreed only for a cause which existed prior to the marriage or contemporaneously with it."); see also Foote, *supra* note 38, at 92 ("An annulment is appropriate where there has never been a valid marriage because of defects existing at the time of the ceremony . . .").

40. Laurence Drew Borten, *Sex, Procreation, and the State Interest in Marriage*, 102 Colum. L. Rev. 1089, 1094 (2002) (explaining an annulment: "Had all facts been known to the parties and the state beforehand, the marriage should not have taken place.").

41. Note, *supra* note 5, at 148.

Civil Code fails to recognize both error and fraud.⁴² As justification for the elimination of "mistake respecting the person," the Louisiana State Law Institute⁴³ claimed that the vice "had been so narrowly interpreted by the jurisprudence that it was obsolete."⁴⁴ But, "[b]ecause something occurs rarely should not mean that the law should not provide for it. The law exists to prevent disputes from arising, as well as to solve disputes which do."⁴⁵ Further, it is well established in the civilian tradition that a civil code is intended as an anticipatory device,⁴⁶ as opposed to the judicial decisions of the common law, which deal with particular situations only as they arise.⁴⁷ Elimination of this potential cause for annulment seems to defeat this traditional civilian notion, making American jurisdictions that do recognize potential grounds for nullity in marriage other than duress seem more in line with civilian traditions than Louisiana, the

42. La. Civ. Code art. 93; see *supra* text accompanying note 18.

43. Marcel Planiol, 1 *Elementary Treatise on the Civil Law: Conforming to the Official Program of the Faculties of Law VIII* (La. State Law Inst. trans., 12th ed. 1958) (1938) ("The Louisiana State Law Institute was chartered, created and organized as an official law revision commission, law reform agency, and legal research agency of the State of Louisiana by Act 166 of the Legislature of 1938.").

44. Spaht, *supra* note 24, at 1144-45 (1988). But see Thomas E. Carbonneau, *The Family and the Civil Code: Teaching Materials on the Louisiana Law of Domestic Relations* 63 (Claitor's Publ'g Div. 1983) ("The litigation under Article 91 has not been extensive and is dated; as a result, many of the cases—either in their reasoning or result—may appear to be obsolete.").

45. Valentina Zace, *Albania: Family Law Under the Dictatorship of the Proletariat*, 33 U. Louisville J. Fam. L. 259, 263 (1994-1995) (arguing in response to the failure of Albanian law to recognize sham marriages as sufficient grounds for annulment because of the Proletariat's determination that "such cases are very rare and divorce laws can take care of them."); see also Marcel Planiol, 1 *Treatise on the Civil Law* § 1, nos. 1-1609, 994 (La. State Law Inst. trans., 12th ed., 1959) (1939) (Describing the Code Napoleon, the author asserts, "[t]he law maker's intention was to foresee everything and to regulate everything.").

46. See F.H. Lawson, *A Common Lawyer Looks at the Civil Law* 80 (Greenwood Press Publishers 1955) ("[T]he law might and should look essentially to the future, together with the companion idea that the perfect form of law was statute law and the perfect form of statute a coherent, systematic code."); Barry Nicholas, *French Law of Contract* 6 (Butterworth & Co. Ltd. 1982) ("A code in the strict sense is a systematic and complete statement of a body of law.").

47. Nicholas, *supra* note 46, at 5 (noting that "for him (the Common lawyer) law has characteristically been the unwritten law found in the decisions of the courts.").

only mixed jurisdiction in the United States.⁴⁸ Moreover, though lacunae exist in even the most carefully-crafted civil code,⁴⁹ such gaps do not afford the judge liberal legislative power;⁵⁰ instead, in the absence of legislation, the Louisiana judge must seek customary law.⁵¹ Thus, the civil law judge is still not permitted to formulate new legislation.⁵² In order to consistently emphasize the importance of marriage and to appropriately adhere to its civilian roots, the Louisiana Legislature should re-institute error and fraud as grounds for annulment of a marriage.

III. A HISTORICAL LOOK AT THE THREE VICES OF CONSENT: ERROR, FRAUD, AND DURESS

Article 1948 of the Louisiana Civil Code sets out the vices of consent for conventional obligations and contracts. It provides,

48. See, e.g., Warren M. Billings, *Mixed Jurisdictions and Convergence: The Louisiana Example*, 29 Int'l J. Legal Info. 272, 273 (2001) ("Louisiana law is unique. That uniqueness originated in a singular convergence of contingencies which pitted French and Anglo-American legal traditions against one another . . . spawn[ing] an unusual jurisdiction in which the French ways predominated and distinguished Louisiana from legal regimes elsewhere in the Union.").

49. John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* 43 (Stanford University Press, 2d ed. 1985) ("[T]he dogma that a code can be complete and coherent fails to survive even a cursory glance at the jurisprudence [T]he books are full of decisions in which the court has had to fill gaps in the legislative scheme and reconcile apparently conflicting statutes.").

50. John Henry Merryman, *The Italian Style III: Interpretation*, 18 Stan. L. Rev. 583, 596 ("Lacunae are filled from within the legislative scheme rather than from without . . . so there is no need to resort to the creative power of the judge.").

51. See La. Civ. Code art. 1 ("The sources of law are legislation and custom."); La. Civ. Code art. 3 ("Custom results from practice repeated for a long time and generally accepted as having acquired the force of law. Custom may not abrogate legislation."); and La. Civ. Code art. 1 cmt. (b) ("[L]egislation and custom are authoritative or primary sources of law. They are contrasted with persuasive or secondary sources of law, such as jurisprudence, doctrine, conventional usages, and equity, that may guide the court in the absence of legislation and custom.").

52. Boris Starck, *Droit Civil: Introduction*, n. 132-140, 57-61 (J.R. Trahan trans., *Libraries Techniques* 2d ed. 1976) (1997) ("The requirement that the judge base every decision on a legislative text (or some other source of law) puts a rein on his power and constitutes an obstacle to a certain judicial sentimentalism.").

“Consent may be vitiated by error, fraud, or duress.”⁵³ Though the 1870 Louisiana Civil Code used different language in the context of consent to the marital contract, the result was the same. Article 91 dictated that consent to a marriage was not free when (1) “given to a ravisher;” (2) “extorted by violence;” or (3) “there is a mistake respecting the person.”⁵⁴ Article 91’s reference to “violence” was indicative of duress.⁵⁵ “Mistake respecting the person” was interpreted as a corollary of error.⁵⁶ With regard to the traditional vice of fraud, courts and scholars defined it as “merely induced mistake and therefore . . . within the terms of Article 91(3) [mistake respecting the person].”⁵⁷ Thus, in the context of marriage, the 1870 Civil Code recognized the three classic vices of consent applicable to all contracts.

In 1987, the Louisiana Legislature, on recommendation of the Louisiana State Law Institute, enacted Act Number 886.⁵⁸ The Louisiana State Law Institute redrafted the chapters dealing with marriage,⁵⁹ and the recognized vices of consent to a valid marriage

53. La. Civ. Code art. 1948.

54. La. Civ. Code art. 91 (1870) (quoted *supra* note 17).

55. See George M. Snellings, III, *Louisiana Law on the Nullity of Marriage*, 20 La. L. Rev. 563, 565 (1959–1960); Spaht, *supra* note 24 at 1144; see, e.g., *Fowler v. Fowler*, 131 La. 1088, 1091, 60 So. 694, 695 (1913) (Interpreting “extorted by violence,” the court observed that “in order that a marriage obtained through duress may be validated, it is necessary that the ratification be after the duress has ceased to be operative.”); *Succession of Barth*, 178 La. 847, 850, 152 So. 543, 544 (1934); *Lacoste v. Guidroz*, 47 La. Ann. 295, 16 So. 836 (1895).

56. See, e.g., *McKee v. McKee*, 262 So.2d 111, 113 (La. App. 2d. Cir. 1972) (Interpreting “mistake respecting the person,” the court stated, “The error, or lack of consent contemplated by the codal provisions relates to the identity of a person and not to the quality, age, or name of the person with whom one has entered into a contract of marriage.”).

57. *Verneuille v. Verneuille*, 438 So.2d 615, 617 (La. App. 4th Cir.), writ denied 443 So.2d 596 (1983); see *Hubert*, *supra* note 38, at 219; R.B.L., Note, *Marriage and Annulment—Fraud: Concealment of Nationality*, 3 La. L. Rev. 831, 832 (1940–1941) (noting that in the courts of Louisiana, “fraud is limited to a mistake of person, which has been construed to mean a mistake in physical identity.”).

58. 1987 La. Acts No. 886; see also Spaht, *supra* note 24, at 1131.

59. Hearing on H.B. 1717 Before the Subcomm. on Judiciary A, 1987 Leg. 2 (La. 1987) (Representative Fernandez explained that the bill “would distinguish what the marriage contract is about, describing what the vices of consent are, describing as absolute nullities those that are contracted by procuration or those that are contracted in spite of legal impediments.”).

were decreased in number and simplified in wording.⁶⁰ The most recent version of the Civil Code article detailing the vices of consent applicable to marriage provides as follows: "Consent is not free when given under duress or when given by a person incapable of discernment."⁶¹ With the deletion of "mistake respecting the person," both error and fraud—recognized in the 1870 Code—have been eliminated; thus, recognition of the traditional vices is no more.

A. Establishing the Elimination of Error and Fraud

The vices of error and fraud are not only absent from the statutory language of the present article on marriage annulments, but application of the vices by way of extension is also foreclosed because of the special nature of a marriage contract and the exclusivity of the annulment article.

1. Marriage as a Contract

Though Louisiana's Civil Code defines marriage as a "civil contract,"⁶² this notion is often questioned.

There is a tension between the conception of marriage as a *status* (conferred and recognized by the state with privileges granted to married persons and denied to unmarried persons) and as a contract (which can be entered into by the parties of their own free will and then will be recognized by the state). If marriage were merely a contract, then anyone could enter the marriage relationship by agreement and obtain its benefits. This is not the law.⁶³

60. Compare La. Civ. Code art. 91 (1870) (quoted *supra* note 17), with La. Civ. Code art. 93 (quoted *supra* note 18).

61. La. Civ. Code art. 93.

62. La. Civ. Code art. 86.

63. Joseph William Singer, Introduction to Property 374 (2001); see Katherine Shaw Spaht, *A Proposal: Legal Re-Regulation of the Content of Marriage*, 18 Notre Dame J.L. Ethics & Pub. Pol'y. 243, 246 (2004) ("Historically, the law of Louisiana, as was true of the law of other states as well as other countries in the West, highly regulated entry into marriage."); *Wilkinson v. Wilkinson*, 323 So.2d 120, 126 (La. 1975) ("[T]he state has broad authority to regulate the status of marriage.").

The recognition of a special place for a marriage contract, separated from traditional obligations, calls into question the propriety of applying general obligations laws to the contract. The generally accepted view is that, "[b]ecause of its special nature, the contract of marriage is subject to rules of its own concerning vices of consent,"⁶⁴ this forecloses application of the vices of consent for general obligations to the marriage contract. Thus, state regulation of marriage requires strict adherence to the specific articles allocated for this particular contract. As such, the elimination of fraud and error from the article detailing the particular vices of consent in the marriage context seems to have completely eliminated their application, even by way of analogy.

2. *Louisiana's Present Article on the Vices of Marital Consent: Exclusive or Illustrative?*

While it may be argued that the vices of consent announced in Article 93 (the present article) are not exclusive, comment (a) provides, "[t]his Article [93] carries forward the most important provisions of its sources"⁶⁵—specifically, articles 90 and 91 of the 1870 Code and the associated jurisprudence.⁶⁶ Noticeably absent

64. Saul Litvinoff, *Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion*, 50 La. L. Rev. 1, 22 (1989) [hereinafter Litvinoff, *Vices of Consent*]; see also Saul Litvinoff, *Good Faith*, 71 Tul. L. Rev. 1645, 1647–1648 (1997) ("[A]ccording to the Louisiana Civil Code, marriage is a legal relation created by civil contract, but its peculiar institutional nature, plus the fact that it is not a contract intended to give rise to credit-rights, places it outside the ambit of the law of obligations and within the realm of family law.").

65. La. Civ. Code art. 93 cmt. (a).

66. La. Civ. Code art. 90 (1870) ("Essentials of Valid Marriage") provided:

As the law considers marriage in no other view than that of a civil contract, it sanctions all those marriages where the parties, at the time of making them, were:

1. Willing to contract;
2. Able to contract;
3. Did contract pursuant to the forms and solemnities prescribed by law.

See *supra* note 17 (text of La. Civ. Code art. 91 (1870)); La. Civ. Code art. 93 cmt. (b) (referencing *Fowler v. Fowler*, 131 La. 1088, 60 So. 694 (1913) (duress); *Quealy v. Waldron*, 126 La. 258, 52 So. 479 (1910) (duress); *Grundmeyer v. Sander*, 175 La. 189, 143 So. 45 (1932) (duress); *Lacoste v. Guidroz*, 47 La. Ann. 295, 16 So. 836 (1895) (duress)); La. Civ. Code art. 93 cmt. (c) (which references *Stier v. Price*, 214 La. 394, 37 So.2d 847 (1948) (the Comment incorrectly cites the date as being 1899, the year of the *Delpit*

from the comments to the present article is any indication that the article is not intended to change the law.⁶⁷ Thus, the elimination of "mistake respecting the person" was intended to and actually did serve to erase the vices of both error and fraud,⁶⁸ leaving only duress as a cause for nullification.

Article 95 ("Relatively null marriage; confirmation") supplements article 93 by explaining the effects of vitiated consent.⁶⁹ However, resorting to the articles cross-referenced by articles 93 and 95 still does not warrant application of the general articles on obligations. First, it is interesting that neither article references the other, though they are clearly related.⁷⁰ Moreover, despite its reference to article 1948,⁷¹ which lists the three vices of consent in conventional contracts and obligations, article 95 only notes two specific articles on error.⁷² Absent from its cross-reference list are any of the articles on fraud or duress; this is odd, as duress is the only explicitly noted vice in the earlier article.⁷³ Further, the mere cross-reference to two articles dealing with error fails to supplement the omission of the vice from either of the marriage articles themselves. Notably, article 1950 ("Error that

decision) (insanity); *and* Sabalot v. Populus, 31 La. Ann. 854 (1879) (insanity) (Delpit v. Young is not cited, which indicates that even the limited application of "error respecting the person" has been eliminated.).

67. Compare La. Civ. Code art. 93 cmt. (a) with La. Civ. Code art. 92 cmt. (a).

68. Hearing on H.B. 1139 Before the Civil Law and Procedure Comm., 1987 Leg. (La. 1987) (statement of Professor Katherine Shaw Spaht, Louisiana State Law Institute, Paul M. Hebert Law Center) (After indicating that proposed changes were made to the article detailing the marital vices of consent, the speaker notes, "if [consent is] given under duress, that incorporates two of the three examples given presently in article 91," namely consent given to a ravisher and consent extorted by violence. She then emphasizes that the only other noted vice, "incapable of discernment, is a new term for the civil code." As such, the "mistake respecting the person" language has not been incorporated into the revised article.).

69. La. Civ. Code art. 95 (which begins, "[a] marriage is relatively null when the consent of one of the parties to marry is not freely given.>").

70. La. Civ. Code art. 93 (which begins, "*Consent is not free . . .*" (emphasis added)); La. Civ. Code art. 95 (which applies "when the consent of one of the parties to marry is *not freely* given." (emphasis added)).

71. La. Civ. Code art. 1948 ("Vitiated consent"); see *supra* text accompanying note 53.

72. La. Civ. Code art. 1949 ("Error vitiates consent"); La. Civ. Code art. 1950 ("Error that concerns cause").

73. La. Civ. Code art. 93.

Concerns Cause”), one of the two referenced articles, encompasses all of the recognized causes of error, going well beyond “mistake respecting the person.”⁷⁴ If one is to rely upon these cross-referenced articles, it would seem that all recognized forms of error now permit annulment of a marriage—surely, this is not the case. Further, not only was the Code originally published without cross-references,⁷⁵ but the inaccuracy of the cross-references has also been noted.⁷⁶ Therefore, reliance on any of the cross-referenced articles seems baseless.

B. Historical Analysis of “Mistake Respecting the Person”

Louisiana’s current position on annulments of marriage is the result of conflicting historical interpretations of its French source article, as evidenced by French commentary and Louisiana jurisprudence.

1. The Vice of Error and its Evolution

As the more disputed of the two vices encompassed by “mistake respecting the person,” the marital vice of error was the catalyst for the state’s present non-recognition of both error and fraud as sufficient grounds for nullifying a marriage.

a. The Conflicting Interpretations of the French Civil Code Article

The source article for former Louisiana Civil Code article 91—article 146⁷⁷ of the Code Napoleon, in conjunction with article 180⁷⁸ of the Code Napoleon—has been given to competing

74. See *infra* Part IV.A.1.

75. Robert Anthony Pascal, *Of the Civil Code and Us*, 59 La. L. Rev. 301, 306 (1998) (“Published as they were originally, without titles to articles, without cross-references, case references, comments, and notes of various kinds, our Digest and Codes were eminently readable documents.”).

76. See, e.g., Symeon Symeonides, *Property*, 45 La. L. Rev. 541, 542 n.12 (1984) (With regards to article 2726, “[t]he cross-reference was incorrect and was instead meant to be a reference to article 495.”).

77. C. Civ. art. 146 provides: “Consent is essential to the validity of a marriage.” Edmond Kelly, M.A., *The French Law of Marriage and the Conflict of Laws that Arises Therefrom* 112 (Fred B. Rothman & Co. 1985).

78. C. Civ. art. 180 provides:

interpretations.⁷⁹ During the drafting of the Code Napoleon,⁸⁰ Napoleon himself demanded that mistake as to the qualities of the person be a basis for annulment.⁸¹ In Napoleon's opinion, "error in the person" as a ground for annulling a marriage, should be considered as meaning the same thing, or as including within its meaning, 'error in the character, attributes, or quality of the person.'⁸² The views of several French commentators accorded with Napoleon's opinion, as they believed that the vice "should not be restricted to errors in physical identity but should include some errors as to quality such as impotence, prostitution, and former conviction of felony."⁸³

Affirming this interpretation was Marcadé, a preeminent nineteenth century French scholar who wrote an explication of the Code Napoleon.⁸⁴ In this work, Marcadé referenced two cases involving mistakes respecting the qualities of the persons, not the actual physical identities, wherein the courts annulled marriages.⁸⁵ The first case, decided in 1811 by the Court of Agen, involved a

An action to annul a marriage contracted without the free consent of the married persons or of one of them, can only be brought by the married person or persons whose consent has not been free. Where mistake has occurred in the person, an action to annul the marriage may only be brought by the party who has been mistaken.

See Kelly, *supra* note 77, at 122 (indicating that article 180 "must be read in connection with Article 146 on the subject of Consent. Article 146 provides for the absence of consent, Article 180 for a defective consent.").

79. G.H.R., Note, *Marriage—Annulment on the Ground of Mistake*, 23 Tul. L. Rev. 582, 582–83 (1949); Hubert, *supra* note 38, at 219.

80. Planio, *supra* note 43, at 49. Those commissioned by Bonaparte, "First Consul and the all powerful master of France," were: Tronchet, president of the Tribunal of Cassation; Bigot du Preameneu, a commissioner of the Government attached to that Tribunal; Portalis, a commissioner of the Government attached to the Prize Tribunal and Malleville, a judge of the Tribunal of Cassation.

81. Hubert, *supra* note 38, at 220 (referencing Marcadé).

82. *Delpit v. Young*, 51 La. Ann. 923, 928, 25 So. 547, 549 (La. 1899) (citing Marcadé); see also M.W.M., Note, *Marriage—Annulment—Misrepresentation as to Health—Venereal Diseases*, 15 Tul. L. Rev. 477, 479 (1941).

83. Hubert, *supra* note 38, at 220 n.13–14 (citing 1 Victor Marcadé, *Explication du Code Napoleon* 476 no. 637 (Cotillon 5th ed. 1859) and 2 Alexandre Duranton, *Cours de Droit Francais* 47 no. 63 (4th ed. 1844)); *Delpit*, 51 La. Ann. at 930, 25 So. at 549 (referencing Demolombe and Marcadé).

84. See 1 Victor Marcadé, *Explication du Code Napoleon* 476 no. 637 (Cotillon 5th ed. 1859).

85. See, e.g., *Delpit*, 51 La. Ann. at 928, 25 So. at 549.

woman who mistakenly married a priest.⁸⁶ The second decision, rendered by the Court of Bourges in 1827, involved the misrepresentation by an adventurer that he was an Italian baron; his deception as to his fortune and status was found to justify an annulment.⁸⁷

Before the Code Napoleon's adoption, error as a vice sufficient to nullify a marriage was thought to exist solely when the error related to physical identity.⁸⁸ The only recognized exception was when a person married a slave believing that he or she was free.⁸⁹ However, the Code Napoleon's article on the marital vices of consent originated in Pothier's *Mariage*,⁹⁰ wherein the preeminent scholar distinguished between different types of error.⁹¹ Commentators have recognized that Pothier's examples of these types of error were actually based upon mere qualities of the person, not physical identity.⁹²

86. *Id.* at 926, 25 So. at 549; Kelly, *supra* note 77, at 123. In addition to these cases, the author notes the following:

The Court of Colmar on the 6th December, 1811, decided that a Catholic woman who, without knowing it, married a man who had once been a monk, could set up such mistake to invalidate the marriage. So also did the Court of Agen hold as to the mistake of a woman who had married a priest (S.60, 2, 353). Again the Court of Chaumont held that a man could set up the pregnancy of his wife unknown to him prior to marriage, so as to invalidate the same (S. 58, 2, 543).

Id.

87. *Delpit*, 51 La. Ann. at 929, 25 So. at 549; Kelly, *supra* note 77, at 123.

88. *Delpit*, 51 La. Ann. at 927, 25 So. at 549.

89. *Id.* (citing Pothier, *Traite du contrat de mariage*, n. 308, 310 and 311 (Letellier 1813)).

90. Planiol, *supra* note 45, at 1061 (referencing Pothier, *supra* note 85, at 308-14). "Art. 180 is merely the reproduction of Pothier's doctrine." *Id.*

91. *Id.* Pothier's examples are as follows:

(1) error regarding the person, which absolutely destroys consent and prevents the marriage from taking place. "[I]f, desiring to marry Marie . . . I pledge my troth to Jeanne, who represents herself to be Marie . . . there is no meeting of two minds, because if Jeanne desired to marry me, I did not desire to marry Jeanne."

(2) error regarding the qualities of the person, which do not prevent the marriage from being valid "because it is not of the essence of marriage that the woman I marry have the qualities, I think she has. It suffices that it be she whom I desired to marry."

92. *Id.* at 1061 n.6. The author states:

Even in the case formulated by Pothier the mistake does not apply to the physical person. Jeanne appeared under the name of Marie. But it was Jeanne whom her husband desired to marry. He thought that her

Nevertheless, more contemporary French scholars exclude mistake respecting the qualities of the person from the vices of consent.⁹³ As noted when Louisiana's former article on marital vices of consent was in place, "Louisiana's position seems consistent with that of the more modern French authorities."⁹⁴ Now that Louisiana has completely eliminated "mistake respecting the person," is Louisiana consistent with any authority?

b. Delpit v. Young: Establishing the Louisiana Judiciary's Narrow Interpretation

The seminal case with respect to former article 91 is *Delpit v. Young*.⁹⁵ Decided in 1899 by the Supreme Court of Louisiana, the case enunciated the court's interpretation of "mistake respecting the person."⁹⁶ Reading the statutory language in its most narrow sense, the court relied heavily upon its explication of article 91's French source article in finding that "mistake respecting the person" was limited to error as to the person's physical identity.⁹⁷ While acknowledging that French scholars, including Marcadé and Demolombe, believed that "error in the person" encompassed error in the *qualities* of the person, the court concluded that only error in the *physical identity* of the person was contemplated by the French article.⁹⁸

To support its conclusion, the court noted,

[T]he Civil Code was first adopted in Louisiana before either of the cases referred to by Marcadé had been decided, and hence, in all probability, at a time when the interpretation of the French law as given by Pothier and the older writers still

name was Marie and that she was a member of a family that was not hers. These are mere qualities.

93. Snellings, *supra* note 55, at 566-67 (citing Aubry and Rau, as well as Baudry-Lacantinerie and Houques-Fourcade).

94. *Id.* at 567.

95. 51 La. Ann. 923, 25 So. 547 (La. 1899).

96. La. Civ. Code art. 91(3) (1870).

97. *Delpit*, 51 La. Ann. at 931, 25 So. at 550.

98. *Id.* at 930, 25 So. at 550.

obtained, and there was no reason to suppose that any other interpretation would be placed on it.⁹⁹

However, the court's reasoning is flawed. To rebut the *Delpit* court's presumption, it is necessary to provide a brief history of the Louisiana Civil Code.

The 1808 Digest, drafted by James Brown and Louis Moreau-Lislet, is considered the first Louisiana Civil Code.¹⁰⁰ Though the Digest was structurally modeled after the Code Napoleon,¹⁰¹ the origin of the Digest's source articles continues to be debated.¹⁰² After the Louisiana Supreme Court noted that "the 1808 Digest was merely an incomplete reproduction of then-existing laws,"¹⁰³ the legislature authorized Pierre Derbigny, Moreau-Lislet, and Edward Livingston to draft what became the Civil Code of 1825.¹⁰⁴ In contrast to the disputes over the sources of the 1808 Digest,¹⁰⁵ it is well settled that "the drafters of the 1825 Code relied heavily on French doctrine and jurisprudence, most notably the French Civil Code."¹⁰⁶ Following the Civil War, the legislature found revision of

99. *Id.*

100. A.N. Yiannopoulos, *Requiem for a Civil Code: A Commemorative Essay*, 78 Tul. L. Rev. 379, 386 (2003) ("Governor Claiborne approved the Digest that came to be known as the Louisiana Civil Code of 1808.").

101. *Id.*, at 387 ("While the drafters of the Louisiana Civil Code based the Digest on a variety of sources, they followed the French Civil Code as a model."); J.R. Trahan, *The Continuing Influence of Le Droit Civil and El Derecho Civil in the Private Law of Louisiana*, 63 La. L. Rev. 1019, 1026 (2003) (Asserting that "the Digest was heavily indebted to the French civil-law tradition," the author emphasizes the likenesses between the Digest's structure and the structure of the French Civil Code.).

102. See, e.g., Alain A. Levasseur, *Grandeur or Mockery?*, 42 Loy. L. Rev. 647, 648 (1997) ("What remains the object of some controversy today is the absolute and definitive identification of the sources of law that Moreau Lislet used in drafting the Digest of 1808."); Vernon Valentine Palmer, *The French Connection and the Spanish Perception: Historical Debates and Contemporary Evaluation of French Influence on Louisiana Civil Law*, 63 La. L. Rev. 1067, 1069 (2003) ("Some scholars theorize that the Legislature intended to codify Spanish substantive ideas and merely used French-language equivalents out of convenience [O]ther scholars, based upon meticulous tracing and overwhelming evidence of verbatim and almost verbatim borrowings, believe that the true sources were French.").

103. Yiannopoulos, *supra* note 100, at 387; see also *Cottin v. Cottin*, 5 Mart (o.s.) 93 (La. 1817).

104. 1822 La. Acts No. 108; John H. Tucker, Jr., *Foreword*, Louisiana Civil Code (2003), ("The real civil code was that of 1825.").

105. See sources cited *supra* note 102.

106. Yiannopoulos, *supra* note 100, at 388.

the Code to be necessary.¹⁰⁷ In 1870, the Revised Civil Code of the State of Louisiana, drafted by John Ray and three fellow attorneys, was adopted by the state.¹⁰⁸ Essentially, this Code was "a verbatim reenactment"¹⁰⁹ of the 1825 Code, as its main alteration was the repeal of slavery articles.¹¹⁰ As such, it is more likely that the French influence upon the 1825 Code, as opposed to the 1808 version, was reflected in the 1870 Code in place when the *Delpit* decision was rendered.¹¹¹ This timely influence is essential, as one of the two cases noted by Marcadé was decided prior to the enactment of the 1825 Louisiana Civil Code.¹¹² Specifically, the 1811 case in which the court granted an annulment to a woman who mistakenly married a priest was not based upon a physical mistake of identity, but rather upon a mistake of status.

Further, though the 1899 *Delpit* court addressed the concept of mistake, the discussion was not essential to its decision. Referring to the court's interpretation of the article as "dicta,"¹¹³ many scholars emphasize that the facts of the case were weak,¹¹⁴ as they merely involved a claim by the husband that his wife had concealed that she was unchaste prior to their marriage. Such claims were likewise dismissed in other jurisdictions, though these jurisdictions

107. Palmer, *supra* note 102, at 1110. Palmer also notes that "[t]here was a technical revision of the Civil Code which took place in 1870, but this came after the Civil War and was designed only to expurgate provisions dealing with slavery which of course by then were unconstitutional." *Id.* at 1109.

108. Yiannopoulos, *supra* note 100, at 389.

109. Vernon Valentine Palmer, Panelist, *The Great Debate Over the Louisiana Civil Code's Revision*, 5 Tul. Civ. L.F. 49, 52 (1990).

110. *Id.*; see also Palmer, *supra* note 102, at 1109; Yiannopoulos, *supra* note 100, at 389.

111. Yiannopoulos, *supra* note 100, at 389.

112. *Id.*

113. G.H.R., *supra* note 79, at 583; see also Snellings, *supra* note 55, at 567 (referring to the court's interpretation of "mistake respecting the person" as "dictum").

114. G.H.R., *supra* note 79, at 583-84. The author emphasizes the following:

The Louisiana courts have never been confronted with strong fact situations such as fraudulent concealment of the paternity of a child or concealment of a venereal disease If such a situation should arise it is possible that the courts would not follow the dictum of *Delpit v. Young*, but would allow an annulment of the marriage on the theory that compelling a man to remain married under these conditions would be contrary to public policy, because it would sanction a personal relationship which would produce discord.

still recognized error as a basis for annulment.¹¹⁵ Thus, the court's mistake discussion was unnecessary to its finding. Should a definitive court decision, rather than dictum, have led to the elimination of error and fraud as vices of marital consent?¹¹⁶

The *Delpit* court also utilized a historical method of interpretation¹¹⁷ by analyzing the French source article and its associated explanations.¹¹⁸ However, the court later refutes this comparative methodology in its opinion.¹¹⁹ Distinguishing between French and American society, the court emphasized the separation of church and state in America, as well as our country's lack of distinct social classes. Noting that "it seems better to interpret our marriage law without the aid of criticism which is inappropriate to the conditions under which it was enacted and to which it is intended to apply,"¹²⁰ the court rebuffed reliance upon French interpretation and rendered its prior discussion inapplicable.

The *Delpit* court concluded its opinion by referencing the 1897 English case of *Moss v. Moss*.¹²¹ In *Moss*, the English High Court denied an annulment to a man deceived into believing that his wife was pregnant with *his* child at the time of marriage, when, in fact, she was pregnant by another man. In its opinion, the *Moss* court referred to and criticized American courts that had permitted annulments under similar circumstances.¹²²

Nevertheless, the *Moss* decision fails to bolster the *Delpit* court's argument, as English law provides neither the source for the pertinent Louisiana annulment article nor the foundation for our civilian tradition.¹²³ Of interest, the *Moss* decision has been

115. See, e.g., *Reynolds v. Reynolds*, 3 Allen 605, 610 (Mass. 1862); *Barnes v. Barnes*, 42 P. 904, 905 (Cal. 1895); *Joy v. Joy*, 12 Ohio Dec. 574 (Ohio Misc. 1900).

116. Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law* 432 (Harvard University Press rev. ed. 1974) (referring to dicta as "nonauthoritative statements" which "may be disregarded by the judge deciding the later case.").

117. See, e.g., Francois Terré, *Introduction Générale au Droit* nos. 471-73, at 474-78 (J.R. Trahan trans., 4th ed. 2001) (1998).

118. *Delpit v. Young*, 51 La. Ann. 923, 926-31, 25 So. 547, 548-50 (La. 1899).

119. Carbonneau, *supra* note 44, at 77.

120. *Delpit*, 51 La. Ann. at 931, 25 So. at 550.

121. (1897) P. 263.

122. *Id.*

123. See *supra* notes 100-12 and accompanying text.

statutorily overruled, as pregnancy by another man at the time of marriage is now a recognized ground for annulment in England.¹²⁴ Therefore, *Moss v. Moss* was of no relevance at the time of the *Delpit* decision, nor is it of any importance now.

As the *Delpit* case illustrates, the courts are reluctant to broadly interpret even explicit vices found in the article concerning the vices of consent in the context of marriage.¹²⁵ Hence, elimination of this language from article 93 completely prevents judicial recognition of either error or fraud.¹²⁶ Because legislation is a primary source of law, Louisiana courts are unable to apply these vices to the contract of marriage without express directives emanating from the legislature.¹²⁷ As such, the possibility for a court to extend its interpretation of "mistake respecting the person" has been severed along with the language in the revision process.

2. The Vice of Fraud and its Limited Recognition

124. See Matrimonial Causes Act, § 12(f) (1973). See also, J.C. Hall, M.A., LL.B., *Sources of Family Law* 54 n.2 (Cambridge at the University Press 1966) (noting that "[p]regnancy *per alium* was made a specific ground for nullity by statute in 1937.").

125. See *Stier v. Price*, 37 So. 2d 847, 848 (Referring to "the specific grounds for the nullity of marriages," the Court indicated that "plaintiff must bring herself within the strict provisions thereof in order to prevail in these proceedings."); see also Linda D. Elrod & the Honorable James P. Buchele, *Kansas Law and Practice: Kansas Family Law* § 9.82 (2003) (In contrast to Louisiana's strict interpretations, the authors note, "[a]s a practical matter when a couple has been married a short time, is young with no children, a court may use its equitable powers to grant an annulment even when technically the grounds may be weak.").

126. Pascal, *supra* note 75, at 305. "[T]he lawyer working with codified civil law should inquire how his situation already has been ordered by the enacted law . . . The lawyer and the judge ought not to participate in the making of law." *Id.* The author later notes, "Neither the Digest of 1808 nor the Civil Codes of 1825 and 1870 permit the decisions of judges to be considered declarative of authoritative rules of law." *Id.* at 307.

127. Spaht, *supra* note 63, at 250 (noting that, in Louisiana, as a civil law jurisdiction, "the law of the family, including that of husband and wife, is the subject of codification . . . [and] is not dependant upon judicial decisions to formulate and reassert legal regulation of the content of marriage."); Planiol, *supra* note 45, at n.994 ("The law maker . . . determined to leave nothing to the chances of a law suit [A]ll the nullities which the law maker cared to recognize are there [in a special chapter devoted to the nullities of marriage] regulated All causes of nullity not set forth in and regulated by Chapter IV of the Title 'Of Marriage' must be rejected.").

Though not included in Article 91's listing of consensual vices to the marriage contract, historically, both doctrine and jurisprudence have recognized the inclusion of fraud.¹²⁸ Scholars often note that "fraud is merely induced mistake and therefore would come within the terms of Article 91(3)."¹²⁹

This view was judicially sanctioned by the Louisiana Fourth Circuit Court of Appeal in *Verneuille v. Verneuille*.¹³⁰ Rendered in 1983, before the revision of article 91, *Verneuille* involved a husband's allegation that "he was induced to marry . . . solely because of [the plaintiff's] false and fraudulent representation that the child she was carrying was his."¹³¹ Purposefully conforming his assertion to the article, the husband pleaded that when he contracted the marriage, he "was acting under a mistake and in error as to the entire identity of the defendant."¹³² While conceding that fraud is recognized under article 91(3), the court cited *Delpit v. Young* and concluded that "the jurisprudence interpreting Article 91(3), however, strictly confines the phrase 'mistake respecting the person' to mean 'mistake respecting the physical identity of the person.'"¹³³ Therefore, the husband's allegation failed to conform to this narrow interpretation.

Likely based on the narrow reading of "mistake respecting the person" under article 91(3), no other Louisiana court has specifically addressed the application of fraud to the marriage contract under this statute. Fraud has been discussed in connection to putative marriages,¹³⁴ but such marriages are instead governed by article 96

128. See sources cited *supra* note 57.

129. Hubert, *supra* note 38, at 220; see also R.B.L., *supra* note 57, at 832 (indicating that "fraud is limited to a mistake of person, which has been construed to mean a mistake in physical identity.").

130. 438 So.2d 615 (La. App. 4th Cir. 1983).

131. *Id.* at 616.

132. *Id.*

133. *Id.* at 617.

134. See, e.g., *Evans v. Eureka Grand Lodge, Free and Accepted Masons, Etc.*, 149 So. 305, 306 (La. App. 2d Cir. 1933) The court provides:

The law measurably protects the innocent party to a bigamous marriage so long as his or her good faith continues. It ceases this benign attitude the moment the innocent party becomes wise to the facts and does not avail himself or herself of the opportunity to prove good faith by disavowing a contract to the execution of which he or she has been induced by *fraud* and deception.

(emphasis added).

("Civil effects of absolutely null marriage; putative marriage").¹³⁵ Verneuille clearly illustrates, however, that the construction of fraud pursuant to "mistake respecting the person"¹³⁶ has received the same narrow reading as error.

Despite this past interpretation and elimination of "mistake respecting the person," the legislature is not prevented from amending the present article concerning the vices of marital consent. The recognition of fraud and error was once in force in Louisiana; such availability can and should exist again.

IV. A PROPOSED REINTRODUCTION OF ERROR AND FRAUD AS MARITAL VICES OF CONSENT IN LOUISIANA

By analyzing the approach of general contract law to the vices of error and fraud, as well as the approaches of other states in the context of marriage, a proposal will be made for reintroducing these vices into Louisiana's laws on marriage. Specifically, Louisiana should recognize these vices when they pertain to the "essentials" of the marriage contract.¹³⁷ In particular, the mutual duties of marriage—fidelity, support, and assistance¹³⁸—should be protected from the vices of error and fraud.¹³⁹ Though breach of these duties may provide grounds for divorce to the other spouse,¹⁴⁰ such breach should also be relevant to an annulment action.

135. La. Civ. Code art. 96 (cmt. (a) explains, "under certain circumstances a person who has contracted a bigamous marriage in good faith will be deemed a putative spouse even after he ceases to be in good faith.").

136. 438 So. 2d 615.

137. Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 Yale J.L. & Feminism 1, 8 (2003) ("The law has long embraced the idea that marriage involves certain essential elements and duties.").

138. La. Civ. Code art. 98 provides, "Married persons owe each other fidelity, support, and assistance."

139. Spaht, *supra* note 63, at 250–51 (provides a detailed explanation of each of the noted duties).

140. *Id.* at 251. ("The consequences of a breach of the three obligations by a spouse are to afford the other aggrieved spouse grounds for divorce, in the case of a breach of the negative obligation of fidelity, and, in other cases, denial of support because of *fault* on the part of the claimant spouse."); see La. Civ. Code arts. 103 & 111.

For example, this approach has been adopted by the state of California.¹⁴¹ After surveying relevant case law from the state, commentators have noted that those representations found to be “essential” to the marital relationship are based on the articles of California’s Family Code.¹⁴² As these statutes indicate, “the Legislature considers procreation and familial support to be the ‘very essence’ of the marital relation.”¹⁴³ Thus, annulment cases are decided in accordance with these precepts.¹⁴⁴

Like California, Louisiana imposes three mutual duties upon the parties to a marriage contract—fidelity, support, and assistance.¹⁴⁵ Yet, the only recognized vice, duress, does not provide a defensive shield for these duties. Instead, duress seems protective of “individual happiness,”¹⁴⁶ not “procreation and familial support.”¹⁴⁷ Aimed only at bodily or reputational protection,¹⁴⁸ duress is ill-suited to defend or preserve any of the three mutual duties of marriage.

A. Assessment of Error as a Vice of Consent

141. See *infra* Part IV.B.3 for recognized grounds for annulment based on fraud; John Walters, *Does It Matter If Bubba Told a Lie? A Marital Dissolution Hypothetical*, 11 J. Contemp. Legal Issues 159, 161 (1999) (After noting the recognized instances of annulment based on fraud, the author indicates that “false representations about business ownership, chastity, and lazy, sloppy drunkenness have been found insufficient to warrant annulment.”).

142. Walters, *supra* note 141, at 162 (stating of the California Family Code, “Little attention is paid there to the emotional or moral aspects of the marital relationship, while considerable effort is devoted to property rights, children, and support in relation to marriage.”); see also Cal. Fam. Code § 720 (West 2004) (listing “mutual respect, fidelity, and support” as the marital obligations).

143. Walters, *supra* note 141, at 162.

144. Note that *Delpit v. Young*, 51 La. Ann. 923, 25 So. 547 (La. 1899), would have been decided in the same manner in California as it was in Louisiana, since false representation of chastity is not a sufficient ground for annulment. See, e.g., *Barnes v. Barnes*, 42 P. 904 (Cal. 1895).

145. La. Civ. Code art. 98.

146. Spaht, *supra* note 63, at 261. In arguing for the recognition of more mutual duties, the author opines that “by the withdrawal of law from the regulation of marriage, couples believe that *their* marriage is a creation of their own, intended for their individual happiness.” *Id.*

147. Walters, *supra* note 141, at 162.

148. La. Civ. Code art. 93 cmt. (b) provides: “As used in this Article, ‘duress’ includes not only executed violence, but also threatened violence, if the threat is pending at the time consent is given Threats to reputation or fortune may be sufficient to invalidate a marriage under this Article.”

Not only is error a recognized vice of consent in the context of general obligations in Louisiana, but many other jurisdictions also list the vice as sufficient to nullify a marriage contract.

1. *Louisiana's Approach with Regard to Obligations in General*

In the context of conventional obligations, Louisiana Civil Code article 1950 categorizes error in five ways.¹⁴⁹ Error may bear on (1) the nature of the contract; (2) the thing that is the contractual object, or a substantial quality of that thing; (3) the person or the qualities of the other party; (4) the law; or (5) any other circumstance that the parties regarded, or should in good faith have regarded, as a cause of the obligation.¹⁵⁰ Thus, the present code makes a "careful enumeration of different categories of error, all of which are just vices of consent and give rise to a nullity which is only relative."¹⁵¹

In contrast to the present Civil Code's single article, the 1870 Code's section on error with regard to obligations in general explicitly recognized the various types of error in different articles.¹⁵² In the 1870 Code, error was categorized in accordance with the Roman classifications of error *in negotio*, *in persona*, *in corpore*, and *in substantia*.¹⁵³ Error *in negotio* entails a mistaken view of the nature of the contract; basically, this is a mistake as to the type of contract.¹⁵⁴ Error *in persona* concerns the identity of the party with whom the mistaken party contracts and leads to nullification "[w]hen that person's identity was important to consent."¹⁵⁵ Error *in corpore* involves mistaken identity of the

149. La. Civ. Code art. 1950.

150. See Litvinoff, *Vices of Consent*, *supra* note 64 (providing a detailed explanation of each of these categories).

151. *Id.* at 10-11.

152. Par. 3—"Of Error, Its Divisions and Effects" (arts. 1820-1823); Par. 4—"Of Error in the Motive" (arts. 1824-1833); Par. 5—"Of Error as to the Person" (arts. 1834-1840); Par. 6—"Of Error as to the Nature and Object of the Contract" (arts. 1841-1845); Par. 7—"Of Errors of Law" (art. 1846).

153. David P. Doughty, *Error Revisited: The Louisiana Revision of Error as a Vice of Consent in Contracting*, 62 Tul. L. Rev. 717, 725 (1988); see also Litvinoff, *Vices of Consent*, *supra* note 52, at 46-47.

154. Doughty, *supra* note 153, at 718. ("The example cited in Justinian's Digest describes a party who erroneously believes he is entering into a sale, but instead makes a loan or a contract for hire.")

155. *Id.* at 719. The author explains:

Typically, an error *in persona* occurred when a party intended to contract with a particular person for a task requiring a measure of skill

contractual object.¹⁵⁶ Finally, error *in substantia* involves error as to determinant qualities¹⁵⁷ or the substance of a thing.¹⁵⁸ Article 1950 still reflects these traditional Roman categories.¹⁵⁹

Louisiana's article concerning error as to the person was heavily influenced by French law.¹⁶⁰ Under article 1110 of the French Code, a broad, subjective approach has been adopted; thus, nullification may result if the mistaken party was in error as to a quality of the other contracting party, if that quality determined his consent.¹⁶¹ Though the article was revised in 1984,¹⁶² old Louisiana Civil Code article 1834, under the category "Of Error as to the Person," stated, "Error as to the person, with whom the contract is made, will invalidate it, if the consideration of the person is the principal or only cause of the contract, as it always is in the contract of marriage."¹⁶³ Louisiana law further recognized that "[e]rror as to the quality or character in which the party acts, as well as a mistake as to the person himself," would invalidate a contract if such was the

or expertise, but erroneously made the contract with another. To prevent abuse of this rule, the Romans required that the other party's skill or personal expertise be strongly connected with the object of the agreement.

Id.

156. *Id.* Note that a mistaken accessory of a correctly identified object does not lead to nullification. For example, error *in corpore* exists when a buyer intends to buy a horse, but mistakenly purchases a mule; but, error as to the horse's color is merely accessory and, as such, is insufficient.

157. *Id.* at 719 ("Generally, an error as to the quality of an object did not affect the validity of the contract unless the quality of the thing differed greatly from its 'distinct commercial category.'").

158. *Id.* at 720. (As example, such an error exists in "the sale of a table supposed to be solid silver but which was instead only silver-plated or made of a different metal.").

159. See La. Civ. Code art. 1950; see also Litvinoff, *Vices of Consent*, *supra* note 64; Doughty, *supra* note 153, at 721 ("The four Roman categories of error, as well as the other concepts they established, continue to permeate the law of obligations.").

160. Doughty, *supra* note 153, at 727.

161. Nicholas, *supra* note 46, at 91-92 ("Article 1110 Cc declares that mistake as to the person with whom one intends to contract is not a cause of nullity 'unless the consideration of this person is the principal cause of the agreement.'").

162. La. Civ. Code art. 1950, 1984 Act No. 331, § 1; see La. Civ. Code art. 1950 cmt. (a) (notes that the article "restates principles found in C.C. Arts. 1824-1846 (1870). It does not change the law . . .").

163. La. Civ. Code art. 1834 (1870).

principal cause of the agreement.¹⁶⁴ However, though quality or character may invalidate some contracts,¹⁶⁵ the Louisiana Supreme Court has resisted extending this principle to marriage contracts, holding that a mistake as to the character of a spouse is insufficient to annul a marriage.¹⁶⁶ This judicial interpretation can not be reconciled with the legislation. The explicit reference to "the contract of marriage" in the article on "error as to the person" seemed to mandate application of the article to these prior cases. Yet, the court's disregard of this language helped establish the narrow interpretation of "mistake respecting the person," which led to its eventual elimination as a ground for annulling a marriage.¹⁶⁷

Though these general obligation articles should not be indiscriminately extended to a marriage contract,¹⁶⁸ these articles provide several useful principles that should be explicitly recognized in the context of annulments. Particularly, the importance placed upon error as to the person and error as to the qualities of the person are relevant considerations in the context of marriage, as the identity and particular essential qualities of the spouse are surely the "principal cause" of the marriage contract.

2. *Recognition of Error as a Marital Vice in Other States*

Several American jurisdictions recognize error as a sufficient ground for annulment. For instance, Kansas lists among its grounds for annulment "mistake of fact" and "lack of knowledge of a material fact."¹⁶⁹ Specifically, a marriage can be annulled "if the parties would not have entered into the marriage contract had all the

164. La. Civ. Code art. 1838 (1870) ("Error as to quality or character in which party acts-Illustration").

165. Doughty, *supra* note 153, at 727-28, 744 n.83 (citing *Bischoff v. Brothers of the Sacred Heart*, 416 So.2d 348 (La. App. 4th Cir. 1982); *Ostrolenk v. Louise S. McGehee School*, 402 So.2d 237 (La. App. 4th Cir.), *writ denied*, 404 So.2d 1259 (1981)).

166. Doughty, *supra* note 153, at 728, 744 n.85 (referencing *Stier v. Price*, 214 La. 394, 37 So. 2d 847 (1948) (denying annulment based on spouse's concealed insanity) and *Delpit v. Young*, 51 La. Ann. 923, 931, 25 So. 547, 550).

167. The Louisiana Supreme Court makes no mention of article 1834 in either *Stier v. Price*, 214 La. 394, 37 So. 2d 847, or *Delpit v. Young*, 51 La. Ann. 923, 25 So. 547.

168. See *supra* Part III.A.

169. Kan. Stat. Ann. § 60-1602 ("Grounds for Annulment").

facts been known.”¹⁷⁰ There is no limitation that the error concern solely the physical identity of the person.

In addition to express recognition of error, numerous states implicitly acknowledge this vice in the context of marriage contracts.¹⁷¹ Impotence is a fertile ground for such implicit recognition.¹⁷² For instance, preceding its statute announcing “Fraud, Duress or Force” as vices of consent of a marriage, Texas statutorily recognizes impotence as a ground for annulment.¹⁷³ This statute only requires that the afflicted party be permanently impotent at the time of the marriage and that the other party not have then known of his impotence.¹⁷⁴ No mention is made of fraudulent misrepresentation or silence; mere lack of knowledge on the part of the mistaken spouse is sufficient.¹⁷⁵

Impotence is a significant ground for annulment, as it so closely relates to the traditionally held view of the purpose of marriage—procreation.¹⁷⁶ In light of contemporary same-sex

170. Elrod & Buchele, *supra* note 125.

171. See *infra* Appendix: State Chart of Marital Vices.

172. See Borten, *supra* note 40, at 1098 (“[M]ost states permit annulment of a marriage on the grounds of the incurable impotency of one party . . .”); Foote, *supra* note 38, at 103 (“Common statutory provisions include prohibitions of marriages of persons who lack the physical capacity to consummate the marriage by sexual intercourse . . .”); see also Kaufman v. Kaufman, 164 F.2d 519 (D.C. Cir. 1947) (“[T]he record contains in the testimony of the plaintiff direct evidence of the defendant’s impotence which . . . was amply sufficient to require a judgment of annulment.”).

173. See, e.g., V.T.C.A. Family Code § 6.106 (Texas—Impotency).

174. *Id.*

175. See, e.g., Cofer v. Cofer, 287 S.W.2d 212, 213 (Tex. Civ. App. 1956). (The plaintiff filed suit “upon the ground that appellee was incurably impotent at the time of marriage and if mistaken in this then that fraud was practised [sic] upon him in that appellant entered into the marriage with the intent never to consummate it by cohabitation.”).

176. See, e.g., William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, 2001 BYU L. Rev. 961, 987 (2001) (The author indicates that marriage is “particularly well suited to advance certain goals . . . [which] include procreation (since a sexual relationship between a man and a woman is the only context in which procreation can take place naturally) . . .”); Harry D. Krause, *Marriage for the New Millennium: Heterosexual, Same-Sex-Or Not at All?*, 34 Fam. L.Q. 271, 299 (2000) (“[T]he real purpose of giving special legal status to marriage and family remains what it has always been: The provision of our first-choice setting for the procreation and raising of children.”). Illustrating the historical importance of this purpose, see, e.g., *Reynolds v. Reynolds*, 3 Allen 605, 610 (“[O]ne of the leading and most important objects of the institution of marriage under our laws is the procreation

marriage issues, this marital purpose has renewed importance. But, Louisiana's failure to place any real worth upon impotence provides same-sex marriage proponents with more leverage to argue that marriage is not founded upon procreation, but, instead, is grounded on individualistic ideals.¹⁷⁷

In recognizing impotence as a grounds for annulment, limitations and conditions should be imposed. As other states have required, the incapacity must have existed at the time of marriage,¹⁷⁸ been unknown to the other spouse at that time,¹⁷⁹ and be incurable and permanent.¹⁸⁰ Moreover, the unaffected spouse can choose to confirm the marriage by never petitioning for an annulment. Therefore, within this narrow framework, the importance of impotence would be recognized by the state, though such incapacity would not prevent affected parties from ever marrying.

Despite the past restrictive reading of "error as to the person" in the context of marriage contracts, there is no reason for its elimination as a recognized vice of consent. Even if restricted to the *Delpit* court's interpretation of error as to the physical identity of a person, the availability for annulment based on error should exist. Particularly, its possible application to a marriage involving a transsexual renders the vice of error a timely addition to the present article.¹⁸¹

of children, who shall with certainty be known by their parents as the pure offspring of their union.").

177. See, e.g., *Testimony of Experts in Family Law: Hearing on H. 3677, H. 1149, and S. 1045 Before the J. Comm. on the Judiciary*, 2003 Leg. (Mass. 2003) (testimony of Professor Katharine Silbaugh, Professor Charles Kindregan, and Monroe Inker, Esq.) (In dismissing the averment that "the primary purpose of marriage is to support procreation," the speakers argue that "the primary purpose of marriage—to support an enduring and committed union of two persons who share sexual intimacy and economic resources—would be furthered by the inclusion of same-sex couples within the institution of civil marriage.").

178. See, e.g., *Helen v. Thomas*, 150 A.2d 833 (Del. 1959); *Dolan v. Dolan*, 259 A.2d 32 (Me. 1969); *T v. M*, 242 A.2d 670 (N.J. Super. Ct. Ch. Div. 1968).

179. See, e.g., *Helen v. Thomas*, 150 A.2d 833; *Rickards v. Rickards*, 166 A.2d 425 (Del. 1960); *Vanden Berg v. Vanden Berg*, 197 N.Y.S. 641 (N.Y. Sup. Ct. 1923).

180. See, e.g., *Dolan v. Dolan*, 259 A.2d 32; *Ferguson v. Ferguson*, 415 P.2d 676 (Idaho 1966); *Sarda v. Sarda*, 153 A.2d 305 (D.C. 1959).

181. La. Civ. Code art. 93; see also Taitz, *supra* note 22, at 55 (1987) ("[A] post-operative transsexual of either sex is absolutely incapable of procreation.").

Ideally, however, error should not be limited merely to error as to the physical identity of the person, but should be recognized in accordance with Louisiana's enunciated marital duties.¹⁸² Particularly, the duty of fidelity must be protected from error because of its connection to impotence.¹⁸³ By re-instituting this ground for annulment of marriage, the Louisiana Legislature will reiterate its adherence to the traditional concept of marriage.

B. Assessment of Fraud as a Vice of Consent

As with error, fraud is also a recognized vice of consent in Louisiana's law of general obligations. Yet, unlike the majority of other jurisdictions,¹⁸⁴ the state does not consider it to be sufficient grounds for nullifying a marriage contract.

1. Louisiana's Approach with Regard to Obligations in General

As defined in Louisiana Civil Code articles 1953 and 1955, contractual fraud involves the inducement of a person into error through misrepresentation or suppression of the truth, with the intention either to obtain an unjust advantage for the inducer or to cause a loss or inconvenience to the other party.¹⁸⁵ In the context of general obligations in Louisiana, fraud has been categorized according to fraudulent actions and inactions. Fraudulent action can

182. La. Civ. Code art. 98.

183. See La. Civ. Code art. 98 cmt. b ("[T]he term fidelity refers not only to the spouses' duty to refrain from adultery [the negative duty], but also to their mutual obligation to submit to each other's reasonable and normal sexual desires [the positive duty]"). Impotence seems to threaten both of these aspects of the duty of fidelity. See also Borten, *supra* note 40, at 1127. Borten argues:

[T]he distinctiveness of marriage has historically been tied to the presumption that it is first and foremost a sexual relationship, a presumption enforceable by either party through the annulment action as an "implied term" of the marital "contract." While it is the procreative potential of sexual intercourse that was behind this presumption, the case law suggests that the concern was not with promoting procreation but rather with preventing it outside of the stable marital relationship.

Id.

184. See *infra* Appendix: State Chart of Marital Vices.

185. La. Civ. Code arts. 1953, 1955.

result from (1) scheme;¹⁸⁶ (2) false assertion;¹⁸⁷ (3) promissory statements;¹⁸⁸ (4) impersonation;¹⁸⁹ (5) concealment;¹⁹⁰ and (6) misrepresentation of legal age.¹⁹¹ Fraudulent inaction, on the other hand, can result from (1) silence;¹⁹² (2) fraudulent reticence;¹⁹³ and (3) duty to disclose with silence.¹⁹⁴ Of these noted instances, all seem possible of application to a marital situation.

As to the duty to disclose, an important exception exists. Ordinarily, fraud is not found if a party could have ascertained the truth "without difficulty, inconvenience, or special skill."¹⁹⁵ However, when a relation of confidence exists between the parties, so that one is inclined to rely on the judgment or statements of the other, reliance upon the party's allegations is justified.¹⁹⁶ Louisiana courts have held that such confidence "must exist in the relation between spouses."¹⁹⁷ Moreover, engaged couples are thought to share such a "relation of confidence" to which the exception to the

186. Litvinoff, *Vices of Consent*, *supra* note 64, at 53 (explaining that this results "when the creation of a false impression requires the concerted action, or conspiracy, of two or more persons who indulge in the production of a sort of dishonest playlet . . .").

187. *Id.* at 54 (equating this to a lie, which "is a simple form of scheme designed to misrepresent a certain state of affairs, and that is, precisely the very essence of fraud.").

188. *Id.* at 55 (noting that no distinction between present or past facts and future facts is made with regard to these false assertions in the Louisiana Civil Code).

189. *Id.* (explaining that this is a "false assertion of identity").

190. *Id.* at 55-56 (stating that, though involved in false assertion and scheme, concealment may be present in non-verbal acts and may include no conspiracy).

191. *Id.* at 56 (noting that this ground is only recognized if the other party reasonably relied upon a minor's misrepresentation of majority).

192. La. Civ. Code art. 1953 ("Fraud may also result from silence or inaction"); *see also* Litvinoff, *Vices of Consent*, *supra* note 64, at 56-57 ("The Code Napoleon makes no reference to silence as a means of committing fraud, but the French doctrine and jurisprudence agree that a party may intentionally induce another into an error through silence or inaction.").

193. Litvinoff, *Vices of Consent*, *supra* note 64, at 57-58.

194. *Id.* at 58-60 (noting that this duty to speak involves the notion of good faith; but, it seems that "good faith does not demand that a party disclose information that he can use to his advantage, provided he does not mislead the other party.").

195. La. Civ. Code art. 1954.

196. *Id.*

197. Litvinoff, *Vices of Consent*, *supra* note 64, at 60 (referencing *Hodson v. Hodson*, 292 So.2d 831 (La. App. 2d Cir. 1974) and *Holcomb v. Kincade*, 406 So.2d 650 (La. App. 2d Cir. 1981), *writ denied*, 410 So.2d 650 (1982)).

duty to disclose should also apply.¹⁹⁸ Numerous other jurisdictions have also recognized the confidential relationship shared by engaged couples, noting that such individuals are not like buyers and sellers who deal at arms' length.¹⁹⁹

Relatedly, Professor Katherine Shaw Spaht,²⁰⁰ the Reporter of the Persons Committee of the Louisiana State Law Institute who helped draft the revisions and who has written numerous articles on the topic of marriage,²⁰¹ asserts, "there is a potential ground for annulment of a covenant marriage that may exist which does not exist explicitly for a spouse who enters a 'standard' marriage: fraud."²⁰² She bases this assertion upon the Declaration of Intent that the parties to a covenant marriage must sign²⁰³ and the "confidential relationship" that exists between an engaged couple.²⁰⁴

Regardless of whether the couple is entering a covenant marriage or a standard marriage, however, this relation of confidence should be recognized in limited circumstances. Mere dissatisfaction with certain personal qualities or beliefs should not be privy to this exception; but, situations of grave fraud relating to

198. Spaht, *supra* note 32, at 130 n.168 ("Clearly, husbands and wives enjoy a confidential relationship; therefore, an engaged couple should enjoy a confidential relationship.").

199. See, e.g., *Levy v. Sherman*, 43 A.2d 25 (Md. 1945); *In re Malchow's Estate*, 172 N.W. 915 (Minn. 1919); *Kline v. Kline*, 57 Pa. 120 (1868); *Pierce v. Pierce*, 71 N.Y. 154 (1877).

200. Jules F. and Frances L. Landry Professor of Law, Louisiana State University Law Center.

201. See Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 Notre Dame L. Rev. 1547, n.a1 (1998) ("The author drafted the Louisiana Covenant Marriage law."); Spaht, *supra* note 24, at 1131 n.2 ("The Reporter for the Persons Committee of the Louisiana Law Institute is the author of this article."). See, e.g., Spaht, *supra* note 32; Spaht, *supra* note 63; Katherine Shaw Spaht, *The Last One Hundred Years: The Incredible Retreat of Law from the Regulation of Marriage*, 63 La. L. Rev. 243 (2003).

202. Spaht, *supra* note 32, at 91. The author's statement serves to undermine the assertion that fraud is recognized in a standard marriage by way of analogy to general obligations rules.

203. *Id.* at 92 (Because the signing of the declaration "transforms a potential 'suppression of the truth' into a 'misrepresentation,'" it is argued that fraud becomes a ground for annulling the covenant marriage.); La. R.S. 9:273.1 (2004) (stating that the parties to a covenant marriage must sign a Declaration of Intent, in which they acknowledge that "[w]e have chosen each other carefully and disclosed to one another everything which could adversely affect the decision to enter this marriage.").

204. *Id.* at 93, n.168.

the essentials of marriage must not be dismissed for lack of due diligence. Some matters are so essential to the contract of marriage that associated acts of fraud on the part of one of the parties must not be tolerated.

2. *Marital Torts Based on Fraud*

Though outside of the realm of contracts, it is significant that marital tort claims can be sustained based on fraud.²⁰⁵ Such an action requires (1) a false representation made by the defendant; (2) knowledge or belief on the part of the defendant that the statement is false (though, in some states, reckless disregard or negligence will suffice); (3) an intent to induce the plaintiff to rely on the misrepresentation; (4) justifiable reliance on the part of the plaintiff; and (5) damage to the plaintiff.²⁰⁶ Reflective of the most common case,²⁰⁷ the Louisiana Third Circuit Court of Appeal allowed an award of damages to be made to a putative spouse in *Holcomb v. Kincaid*,²⁰⁸ based upon the husband's false representation that he had legally divorced his first wife prior to his marriage to the plaintiff.

In a recent case based on fraudulent inducement to marry, the Oklahoma Supreme Court equated tortious fraud to annulment fraud.²⁰⁹ However, commentators assert that "the 'fraudulent' conduct which justifies an annulment is substantially less than that which would be required for a tort."²¹⁰ Based on the potential economic interest involved, it is argued that tort claims should only

205. Robert G. Spector, *Fraudulent Inducement Into Marriage: Still Tortious After All These Years*, 12 No.3 Fair Share 8, 8 (1992) (noting that "wrongfully inducing a person into marriage may be tortious" and that "[t]he tort that is usually relied on is fraud or misrepresentation").

206. *Id.* (referencing Prosser & Keeton, Torts, § 105 at 728 (5th ed., 1984)).

207. Robert G. Spector, *Marital Torts: The Current Legal Landscape*, 33 Fam. L.Q. 745, 756 (1999) ("Most of [the cases] concern the inducement of the plaintiff into a sham marriage.").

208. 406 So.2d 650 (La. App. 2d Cir. 1981).

209. *Miller v. Miller*, 956 P.2d 887 (Okla. 1998) (The court allowed the plaintiff to proceed with his tort claim for fraudulent inducement into marriage against his former wife and in-laws; they had previously misrepresented that the plaintiff was the father of the child she was then carrying.).

210. Spector, *supra* note 207, at 756 ("Other than the situation where one spouse is already married, the cause of action for fraudulent inducement into marriage should be confined to those situations where the economic interests of the plaintiff are invaded.").

be permitted when there exists actual economic deprivation.²¹¹ Because this financial concern is not present in an annulment action, less serious conduct is necessary. As such, Louisiana's recognition of a tort action based on fraud merits allowance of annulments based on fraud.

3. *Recognition of Fraud as a Marital Vice in Other States*

Fraud is recognized as a legitimate ground for annulling a marriage in nearly every other jurisdiction.²¹² Though all states do not explicitly categorize the types of fraud permitting annulment in the same manner, the general rule is that the fraud must relate to "the essentials of the marriage relation."²¹³ Two differing interpretations of the requisite fraud for annulments have emerged. These competing opinions are exemplified by the court decisions rendered in Wisconsin, Massachusetts, and California, on the one hand, and those in New York, on the other.

Evidencing the more prevalent view, the courts of Wisconsin, Massachusetts, and California strictly follow the "essentials" doctrine.²¹⁴ Under this doctrine, the plaintiff must prove the existence of an intentional misrepresentation of an existing material fact or facts which would mislead an ordinarily prudent person to consent to and enter into the marriage.²¹⁵ While fraud is a recognized vice to ordinary contracts, "[t]he difference between fraud in connection with an ordinary contract and fraud as a basis

211. *Id.*

212. *See infra* Appendix: State Chart of Marital Vices.

213. 52 Am.Jur.2d Marriage § 27 (2004); *see, e.g., Wells v. Talham*, 194 N.W. 36, 40 (Wis. 1923)

[T]he degree of disappointment realized by a spouse on the discovery of hidden and disagreeable facts in the past life of the other spouse can hardly be the basis for annulling a marriage unless there has been fraud going to the essentials and material elements on which the marriage relation rests.

214. *See, e.g., Wells*, 194 N.W. 36; *Reynolds v. Reynolds*, 3 Allen 605, 608 (Mass. 1862) ("Nothing can then avoid it [a marriage contract] which does not amount to a fraud in the *essentialia* of the marriage relation."); *In re Marriage of Johnston*, 18 Cal. App. 4th 499, 502 (Cal. Dist. Ct. App. 1993) ("In California, fraud must go to the very essence of the marital relation before it is sufficient for an annulment.").

215. *See, e.g., Lamberti v. Lamberti*, 77 Cal. Rptr. 430, 432 (Cal. Dist. Ct. App. 1969) ("[D]efendant's promises were a misrepresentation of a material fact and were of such a nature as to deceive an ordinarily prudent person.").

for annulment is, in a sense, merely a difference in the definition of the term 'material.'"²¹⁶ Thus, in regards to annulments, the fraudulent misrepresentation must be "essential" or "material" to the marriage contract,²¹⁷ which necessitates a higher standard of proof.²¹⁸

The "essentials" doctrine was established in Massachusetts by the state's Supreme Judicial Court in *Reynolds v. Reynolds*.²¹⁹ Numerous other jurisdictions have proceeded to follow this doctrine, as well. In its often-cited opinion,²²⁰ the *Reynolds* court noted, while marriage is a civil contract, "it is not to be supposed that every error or mistake into which a person may fall concerning the character or qualities of a wife or husband, although occasioned by disingenuous or even false statements or practices, will afford sufficient reason for annulling an executed contract of marriage."²²¹

Thus, "accidental qualities"²²² do not constitute material or essential elements of the marriage relationship and do not permit annulment.

Presently, Massachusetts law recognizes several different types of fraud which lead to an annulment. These include fraudulent

216. Robert Kingsley, *Fraud as a Ground for Annulment of a Marriage*, 18 S. Cal. L. Rev. 213, 213 (1944-1945) (According to the author, courts have defined materiality in the objective sense as follows: "[D]id the misrepresentation, in addition to being an inducement in fact, relate to facts which the law deems of sufficient significance to merit interference with an established status of public concern?").

217. See, e.g., *First Nat'l Bank of L.A. v. Schaub*, 162 P.2d 966, 971 (Cal. Ct. App. 1945)

[I]t is well settled in this state, and in most other jurisdictions, that [the types of fraud sufficient to annul a marriage] do not cover the broad field of deceptions that render voidable other types of contracts. The only fraud which will support a proceeding for annulment of marriage is one which goes to the essence of the marriage relation.

218. See, e.g., *Heup v. Heup*, 172 N.W.2d 334, 337 (Wis. 1969) ("[C]ourts are hesitant to annul marriages on the ground of fraud unless clearly convinced of the existence of the falsity of the representation and that the defrauded party would not have entered into the marriage contract except for such false representation.").

219. 3 Allen at 605.

220. See Kingsley, *supra* note 216, at 213.

221. *Reynolds*, 3 Allen at 607.

222. *Id.*

representations based on pregnancy,²²³ impotence,²²⁴ disease,²²⁵ and marrying for immigration status.²²⁶ Such reasons are reiterated by the courts in California and include concealment of sterility,²²⁷ existing pregnancy,²²⁸ criminal history,²²⁹ intent not to have sexual relations with the spouse,²³⁰ and the desire not to have children despite promise to the contrary.²³¹

An "exceptional case"²³² in California, which justified an annulment of the marriage, was *Schaub v. Schaub*.²³³ The *Schaub* court found that the young wife married her older husband with no intention to fulfill the obligations of marriage.²³⁴ Instead, she had previously conspired with her lover to marry the husband, never consummate the marriage, and obtain the husband's real property by having him execute deeds in joint tenancy.²³⁵ Emphasizing that "[t]he only fraud which will support a proceeding for annulment of

223. *Symonds v. Symonds*, 432 N.E.2d 700, 703-04 (Mass. 1982) (the court permitted annulment when a man married in reliance upon his wife's false representation that she was carrying his child; pre-marital intercourse between the parties did not serve as a defense to the annulment action). See *Reynolds*, 3 Allen at 610 (wife's misrepresentation to her husband that she was chaste, when, in fact, she was then pregnant by another man was found to be "fraud of the gravest character," and the court annulled the marriage).

224. See, e.g., *Martin v. Otis*, 124 N.E. 294, 296 (Mass. 1919) (impotency concealed from spouse as grounds for annulment).

225. See Lisa J. Graff, *Annulment*, in *Massachusetts Family Law Manual* 31, 31.3d (Haskell A. Hassler & Mary H. Schmidt eds., MCLE 3d ed. 1996). Graff argues:

This is determined on a case-by-case basis. The nature of the disease is a relevant fact in that the courts appear more willing to annul a marriage on the ground that a party fraudulently concealed a sexually transmitted disease. It further depends on when the aggrieved party learned and whether, with that knowledge, that party then affirmed the marriage by cohabitation or consummation.

Id.

226. See, e.g., *Damaskinos v. Damaskinos*, 89 N.E.2d 766 (Mass. 1950) (marriage was annulled when one party married solely to avoid deportation).

227. See, e.g., *Vileta v. Vileta*, 128 P.2d 376 (Cal. Ct. App. 1942).

228. See, e.g., *Hardesty v. Hardesty*, 223 P. 951 (Cal. 1924).

229. See, e.g., *Douglass v. Douglass*, 307 P.2d 674 (Cal. Ct. App. 1957).

230. See, e.g., *Millar v. Millar*, 167 P. 394 (Cal. 1917).

231. See, e.g., *Maslow v. Maslow*, 255 P.2d 65 (Cal. Ct. App. 1953).

232. *First Nat'l Bank of L.A. v. Schaub*, 162 P.2d 966, 972 (Cal. Ct. App. 1945).

233. *Id.*

234. *Id.* at 968 (The Defendant agreed with her lover to "falsely represent to plaintiff that she would fulfill all the obligations of a wife.").

235. *Id.*

marriage is one which goes to the essence of the marriage relation,"²³⁶ the court found that the wife's actions warranted an annulment.

Though representing the more liberal interpretation, New York courts also adhere to the "essentials" doctrine.²³⁷ Thus, the courts' "broader view" of material fraud is still judged objectively.²³⁸ Nevertheless, the court in *Waff v. Waff*²³⁹ asserted, "the fraud need not necessarily concern what is commonly called the essentials of the marriage relation;"²⁴⁰ instead, it is sufficient that the fraud is material,²⁴¹ meaning that the defrauded party would not have consented to the marriage had the fraud not been practiced.²⁴² Still, the fraud must be sufficient to deceive a reasonably prudent person.²⁴³ Within the broad category of fraud, New York courts recognize fraud obtained by concealment, as well as by misrepresentation. Exemplifying New York's broad approach, the state's supreme court annulled a marriage based on the husband's false assertion that he would treat the plaintiff's children by a former marriage as his own.²⁴⁴ His failure to contribute to a harmonious household was deemed material to the marriage and justified an annulment.²⁴⁵

Despite the varying degrees of recognition of fraud, it is telling that nearly every other United States jurisdiction, as well as other civil law jurisdictions,²⁴⁶ recognizes fraud as sufficient to annul a marriage. Though every instance of fraud should not justify an annulment, Louisiana should adopt the narrow "essentials" doctrine, which is followed by most jurisdictions and exemplified in

236. *Id.* at 971.

237. Borten, *supra* note 40, at 1117-18.

238. Kingsley, *supra* note 216, at 214.

239. 71 N.Y.S.2d 775 (N.Y. Sup. Ct. 1947).

240. *Id.* at 778 (These "essentials" were "the rights and duties connected with cohabitation and consortium.").

241. *Sophian v. VonLinde*, 253 N.Y.S.2d 496 (N.Y. App. Div. 1964).

242. *Schonfeld v. Schonfeld*, 184 N.E. 60 (N.Y. 1933); *Brazil v. Brazil*, 651 N.Y.S.2d 721, 722 (N.Y. App. Div. 1997).

243. *Kober v. Kober*, 211 N.E.2d 817 (N.Y. 1965); *Brazil*, 651 N.Y.S.2d at 722; *DiLorenzo v. DiLorenzo*, 67 N.E. 63, 65 (N.Y. 1903); *Avnery v. Avnery*, 375 N.Y.S.2d 888 (N.Y. App. Div. 1975), *appeal dismissed*, 348 N.E.2d 915 (1976).

244. *Waff*, 71 N.Y.S.2d at 776-77.

245. *Id.* at 777.

246. See *supra* notes 19-20 and accompanying text.

Wisconsin, Massachusetts, and California. For instance, should an exceptional case like *Schaub*²⁴⁷ arise in Louisiana, the defrauded spouse should have the option to annul the marriage.

The limited recognition of fraud as a marital vice of consent will provide protection to the mutual marital duties, particularly the duty of fidelity.²⁴⁸ Elevation of the breach of these duties above mere grounds for divorce will stress the importance of "fidelity, support, and assistance"²⁴⁹ to the marital relationship, thereby strengthening the institution of marriage. If the "essentials" doctrine is applied with discretion, it will afford defrauded parties an adequate, alternative remedy to dissolution of a marriage.

V. CONCLUSION

In sum, annulments should be recognized in Louisiana as an available option for the dissolution of a marriage procured by error or fraud. However, it must be remembered that this is not an advocacy for a completely liberal acceptance of the three vices of consent. Rather, while it is necessary that these vices be recognized in the contract of marriage, there must be categorical limitations. If recognition is confined to breach of the mutual duties of fidelity, support, and assistance, annulments based on fraud and error will ensure that the "essentials" of marriage remain protected.

Additionally, because these vices are only relative,²⁵⁰ a marriage entered into due to fraud or error can be confirmed.²⁵¹ This permits easy preservation of such a marriage, should the parties desire to continue their union. Further, judicial intervention is mandatory, as the marriage remains valid until the non-consenting spouse brings a

247. First Nat'l Bank of L.A. v. *Schaub*, 162 P.2d 966, 972 (Cal. Ct. App. 1945); see *supra* notes 232–36 and accompanying text.

248. Both the positive duty of fidelity and the negative duty of fidelity will benefit from this protection. See *supra* note 176.

249. La. Civ. Code art. 98.

250. La. Civ. Code art. 95 provides:

A marriage is relatively null when the consent of one of the parties to marry is not freely given. Such a marriage may be declared null upon application of the party whose consent was not free. The marriage may not be declared null if that party confirmed the marriage after recovering his liberty or regaining his discernment.

251. La. Civ. Code art. 95. In the article's 1988 revision, the broader term "confirm" was substituted for "cohabit."

direct action of nullity and the marriage is annulled by judicial decree.²⁵²

Though divorce remains an option for terminating a marriage, an annulment provides a legitimate alternative for a deceived or mistaken spouse. Because an annulment declares that the marriage was invalid from its inception,²⁵³ this option should be used sparingly. But, the availability of annulment should exist for a spouse who has been gravely mistaken or defrauded. By re-instituting the vices of error and fraud, the legislature will reiterate its commitment to the institution of marriage and will preserve the serious, sacred nature of marriage.

*Emily Latham**

252. La. Civ. Code art. 97 cmt. provides: "In Louisiana the relatively null marriage has long been regarded as valid until annulled by a judicial decree rendered in a direct action of nullity brought by a proper party"; *see also* La. Civ. Code art. 95.

253. *See supra* Part II.B.3.

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Appendix

State Chart of Marital Vices

STATE	DURESS	FRAUD	ERROR
Alabama	✓	✓	
Alaska	✓	✓	✓*
Arizona	✓	✓	✓*
Arkansas	✓	✓	✓
California	✓	✓	✓*
Colorado	✓	✓	✓*
Connecticut	✓	✓	✓*
Delaware	✓	✓	✓*
D.C.	✓	✓	✓*
Florida	✓	✓	✓*
Georgia	✓	✓	✓*
Hawaii	✓	✓	
Idaho	✓	✓	✓*
Illinois	✓	✓	✓*
Indiana		✓	
Iowa	✓	✓	✓*
Kansas	✓	✓	✓

Kentucky	✓	✓	✓*
Louisiana	✓		
Maine	✓	✓	✓*
Maryland	✓	✓	✓*
Massachusetts	✓	✓	✓*
Michigan	✓	✓	✓*
Minnesota	✓	✓	✓*
Mississippi	✓	✓	✓*
Missouri	✓	✓	✓*
Montana	✓	✓	✓*
Nebraska	✓	✓	✓*
Nevada	✓	✓	✓*
New Hampshire	✓	✓	
New Jersey	✓	✓	✓*
New Mexico			
New York	✓	✓	✓*
North Carolina		✓	✓*
North Dakota	✓	✓	✓*
Ohio	✓	✓	
Oklahoma		✓	✓*

Oregon	✓	✓	
Pennsylvania	✓	✓	✓*
Rhode Island		✓	
South Carolina	✓	✓	✓
South Dakota	✓	✓	
Tennessee	✓	✓	✓*
Texas	✓	✓	✓*
Utah	✓	✓	✓*
Vermont	✓	✓	✓*
Virginia	✓	✓	✓*
Washington	✓	✓	
West Virginia		✓	✓*
Wisconsin	✓	✓	✓*
Wyoming	✓	✓	

* Statute or case law includes a reference to “Impotency” as a ground for annulment.

